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JURY—RIGHT TO TRIAL BY TWELVE JURORS—WAIVER OF JURY.—Accused pleaded not guilty. A jury was impanelled. After admission of the evidence and argument of counsel, one of the jurors could not be found. Accused asked that the case be submitted to the remaining eleven jurors. The court complied with the request. The eleven jurors rendered a verdict of guilty. *Held,* that the accused could not waive a jury of twelve jurors, in the absence of a statute conferring such a right and the conviction should be set aside. *Jennings* v. *State* (1908), — Wis. —, 114 N. W. Rep. 492.

The question raised by the principal case has repeatedly been discussed by the courts of this country. It is very generally held that a jury trial, in contemplation of the constitution, is a trial by twelve jurors. Hence, in states in which it has been held that the accused may not waive a jury trial, it has most often been held that he may not agree to a trial by less than twelve jurors. But see *State* v. *Grossheim,* 79 Ia. 75, 44 N. W. 541. The weight of authority undoubtedly holds with the principal case that, in cases of felony, a jury of less than twelve jurors may not be agreed to. *Bell* v. *State,* 44 Ala. 393; *People* v. *O'Neil,* 48 Cal. 257; *Hunt* v. *State,* 61 Miss. 577; *State* v. *Scruggs,* 115 N. C. 805; *Cancemi* v. *People,* 18 N. Y. 128; *Hill* v. *People,* 16 Mich. 351. On the other hand, many courts hold that a trial by less than twelve jurors is valid if the accused assents. *State* v. *Kaufman,* 51 Ia. 578, 33 Am. Rep. 148; *State* v. *Sackett,* 39 Minn. 69; *Commonwealth* v. *Dailey,* 12 Cush. (Mass.) 80. But the cases are not as squarely in conflict as might be supposed. In many of the states which hold that a trial by less than twelve jurors may not be agreed to, the constitutional provision providing for jury trial has been construed as establishing the only competent tribunal to try issues of fact in criminal cases. In such states, of course, the accused could not be regarded as having any right which might be waived and therefore no logical objection can be urged against the decisions based on such a construction of the constitution. But in other states, the reason given for denying the right of waiver is that the public has an interest in preventing the conviction of an innocent person and such interest is best preserved by retaining a jury of twelve jurors. This reasoning has been severely criticised by courts which allow a waiver on the ground that the accused has been allowed to waive practically all the rights given to an accused person by the constitution and that the preservation of jury trial is of no more importance to the public than the preservation of these other rights. Hence, no distinction should be made between them. The tendency of the courts would seem to be in favor of a more liberal doctrine of waiver.

LARCENY—STEALING VOID TOWN ORDERS.—The defendant was a member of the Board of Supervisors of a certain town. With the expectation of fraudulently procuring money, the board entered into a conspiracy to present the claims of fictitious persons against the city to the board. The claims were presented and allowed by the board and town orders were made out for the amount fraudulently claimed to be due. Defendant cashed three of those town orders and thereby obtained over $700 in money. *Held,* that he was guilty of larceny. *Vought et al.* v. *State* (1908), — Wis. —, 114 N. W. Rep. 518.

The principal case raises a novel question as to the property which may be the subject of larceny. At common law, a chose in action was not the subject of larceny. But by the Wisconsin statutes, larceny is defined so as to include the stealing of another's property, "if the value thereof shall exceed $100." St. 1898, § 4415. There is no doubt, therefore, that if the town orders had been valid, they would have been the subject of larceny. But as they were fraudulently issued, they were null and void and created no obligation against the city, no matter into whose hands they might fall. *Hubbard* v. *Lyndon,* 28 Wis. 674. Does the void character of the town orders therefore so deprive them of value that they can not be the subject of larceny? The majority opinion answers the question in the negative and reliance is placed mainly upon *State* v. *White,* 66 Wis. 343, 28 N. W. 202. In that case, the unissued bonds of a city were held to be the subject of larceny. But the city would have been held liable on such bonds in the hands of a bona fide holder—at least in some courts. The court, however, said that the bonds were the subject of larceny, even though the city would not have been liable upon them. See also, *Commonwealth* v. *Rand,* 7 Metc. (Mass.) 475, 41 Am. Dec. 455; *Bork* v. *People,* 91 N. Y. 5. But, in these cases, the obligations were valid and enforceable in the hands of a bona fide holder. A county warrant obtained by fraud and void is the subject of larceny. *State* v. *Morgan,* 109 Tenn. 157, 69 S. W. 970. Notes to be the subject of larceny must be genuine and valid. *Wilson* v. *State,* 1 Port. (Ala.) 118; *State* v. *Smart,* 4 Rich. L. (S. Car.) 356; *Starkey* v. *State,* 6 Oh. St. 267. It has also been held that the value of an article as a statutory subject of larceny is its market value. 12 A. & E. ENCY. OF LAW, 1st ed., p. 786 n; *Filson* v. *Territory,* 11 Okla. 351, 67 Pac. 473; *State* v. *Smith,* 48 Ia. 595; *State* v. *James,* 58 N. H. 67. But actual value may be taken as a standard when the article has no market value. *State* v. *Maggard,* 160 Mo. 469, 61 S. W. 184.

MANDAMUS—DISCRETION OF OFFICER—ARBITRARY EXERCISE.—Under the so-called Racing Law of New York, making it necessary for a corporation wishing to conduct running or steeplechase meets to secure a license, the State Racing Commission "may grant" the license "if, in the judgment of such commission," a proper case is shown (Laws 1895, C. 570, Sec. 6). *Held* (O'BRIEN, E. T. BARTLETT and HISCOCK, JJ., dissenting), that although the power given the commissioners was discretionary, that nevertheless a refusal to grant the relator a license because its track would interfere with racing dates on other tracks, was arbitrary and that the issuance of the license could be compelled by mandamus. *People ex rel. Empire City Trotting Club* v. *State Racing Commission et al.* (1907), — N. Y. —, 82 N. E. Rep. 723.

The question is squarely presented, that granting a discretionary power has been given an administrative officer, and he has acted erroneously, can the error be corrected by mandamus? The answer in theory and by weight of authority is clearly that mandamus will not lie, since to permit it to do so would be in effect substituting the discretion of the court for the discretion of the officer. HIGH EX. LEG. REM. 24, 34, 156; 26 CYC. 160. *City of Louisville* v. *Kean,* 57 Ky. 9; *State* v. *Hastings,* 10 Wis. 518; *State* v. *Young,* 84 Mo. 90;